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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. [redacted] 177

SOUTHWEST ENGINEERING COMPANY,
a Missouri corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Reasons for granting the writ	3
Conclusion	10
Appendix A (Opinion below)	A1

CITATIONS

Cases:

Frick Co. v. *Rubel Corp.*, (2 Cir. 1933) 62 F.2d 765, 768	9
Massman Construction Co. v. *City Council of Greenville, Miss.*, (5 Cir. 1945) 147 F.2d 925	4
Northwest Fixture Co. v. *Kilbourne & Clark Co.*, (9 Cir. 1904) 128 Fed. 256	5
Priebe & Sons v. *United States*, 332 U.S. 407	6
Rex Trailer Co. v. *United States*, 350 U.S. 148	8, 9
Rispin v. *Midnight Oil Co.*, (9 Cir. 1923) 291 Fed. 481, 34 A.L.R. 1331	4
Sommers v. *Timely Toys, Inc.*, (E.D. N.Y. 1953) 110 F. Supp. 844, *appeal denied* (2 Cir. 1954) 209 F.2d 342	5
Sun Printing & Publishing Association v. *Moore*, 183 U.S. 642	9
The Columbia, (D.C. Ala. 1912) 197 Fed. 661, *aff'd sub nom. Rasmussen* v. *Home Industry Iron Works*, (5 Cir. 1912) 199 Fed. 990	5
United States v. *Bethlehem Steel Co.*, 205 U.S. 105	9

United States v. *LeRoy Dyal Co.*, (3 Cir. 1950) 186 F.2d 460 9

United States v. *J. D. Streett & Co.*, E.D. Mo., 151 F. Supp. 469, aff'd upon appeal (8 Cir. 1958) 256 F.2d 557 9

Statutes and Regulations:

62 Stat. 933 (1948) 28 U.S.C. § 1346(a)(2) 2

28 U.S.C. § 1257 (1) 2

32 Stat. 310, 326, c. 1031, 40 U.S.C.A. §269, 9A FCA Title 40, §269, repealed Oct. 31, 1951, c. 654 §1 (91), 65 Stat. 705 7

41 U.S.C.A. §256 (a) 7

Treatises:

5 *Corbin on Contracts*, §1063 9

15 Am. Jur., *Damages*, §263 9

25 C.J.S., *Damages*, §115d 9

Restatement, Contracts (1932) §339 10

Annotations:

34 A.L.R. 1336, §1341 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit was entered on March 1, 1965 (Appendix A, *infra* p. A1) and is reported at 341 F.2d 998. The memorandum of the United States

District Court for the Western District of Missouri is not reported but appears in the record. (R. 7-13).

JURISDICTION

The judgment below was entered on March 1, 1965. (R. 12). Jurisdiction of this Court is invoked under 28 U.S.C., § 1257(1). Original federal jurisdiction of this contract action against the United States was invoked under 62 Stat. 933 (1948); 28 U.S.C., § 1346(a) (2).

QUESTION PRESENTED

Whether the United States may withhold liquidated damages for delay under a peacetime government construction contract where the government has stipulated there were no damages sustained.

STATEMENT

Petitioner and the United States in 1957 entered into three contracts with liquidated damage for delay clauses under which petitioner constructed three V.O.R. radio facilities at Blackwater, Readsville and Maryland Heights, Missouri and a high intensity approach light lane at Lambert Field, St. Louis County, Missouri. (R. 1-2). Petitioner performed its contracts in all respects except for delays which the government has stipulated *did not cause any "actual damage on any project"*. (R. 4).

Despite this total absence of damage the government, after administrative appeals, withheld damages—$550 from Blackwater, $4,050 from Readsville, $2,000 from Lambert Field, and $1,700 from the Maryland Heights project.

Petitioner brought this action to recover the amounts withheld plus interest. Detailed facts appear in the agreed statement in the record. (R. 1-7).

The district court granted the government's motion for summary judgment (R. 5, 7-13); judgment was entered against petitioner dismissing petitioner's complaint and awarding the government the liquidated damages withheld. (R. 13-14).

Petitioner duly appealed to the United States Court of Appeals for the Eighth Circuit, which court affirmed and in its opinion at 341 F.2d 1003, stated:

> "We recognize that there are cases, including *Massman Const. Co.* v. *City Council of Greenville*, 9 Cir. (Sic. 5 Cir.), 147 F.2d 925, *Rispin* v. *Midnight Oil Co.*, 9 Cir., 291 Fed. 481, and *Northwest Fixture Co.* v. *Kilbourne & Clark Co.*, 9 Cir., 128 Fed. 256, cited by Southwest, which reach a contrary result."

Petitioner herewith files its timely petition for a writ of certiorari.

REASONS FOR GRANTING WRIT

The decision below should be reviewed for each of the following reasons:

(1) The judgment and opinion conflict with the direct holdings of the United States Courts of Appeals for the Fifth and Ninth Circuits.

(2) This is an important matter of federal law in that the judgment and opinion mark a significant and unwarranted departure from the heretofore recognized doctrine of compensatory damage in federal contracts.

1.

The judgment and opinion below conflict with the direct holdings of the United States Courts of Appeals for the Fifth and Ninth Circuits.

The holding that, in a "No damages" case, liquidated damages may be allowed is at odds with the direct holding in *Massman Construction Co.* v. *City Council of Greenville, Miss.*, (5 Cir., 1945) 147 F.2d 925. There the city sought liquidated damages for a contractor's delay in finishing piers for a toll bridge which was completed before the highway to the bridge. There was no damage; the court declared "the enforcement of the liquidated damages provision" in these circumstances would be "inequitable" and "unreasonable" and amounted to the "inflicting of a penalty". *Id.* at 928. The Eighth Circuit in the opinion below recognized this direct conflict (*Infra* p. A10). The judgment and opinion below conflict with direct holdings of the Ninth Circuit. In *Rispin* v. *Midnight Oil Co.*, (9 Cir. 1923) 291 Fed. 481, 34 A.L.R. 1331, Midnight had a contractual right that Associated Oil Co. drill a well. Rispin guaranteed Associated's performance, and agreed to pay Midnight $10,000 liquidated damages. Associated did not drill but Midnight suffered no damage. Nearby drillings revealed no oil existed. Midnight's judgment for liquidated damages was reversed. The Ninth Circuit held Midnight had a duty to give possession and on the damages issue stated:

> ". . . it is not necessary to decide whether the clause is to be read as a penalty or as one for liquidated damages, for the reason that, even granting that it must be read as for liquidated damages, it will not be enforced where no damage whatever has been sustained." *Id.* at 484.

In *Northwest Fixture Co.* v. *Kilbourne & Clark Co.*, (9 Cir. 1904) 128 Fed. 256, the referee in bankruptcy, the district court and the Ninth Circuit Court of Appeals all refused to enforce a liquidated damages clause where it was plain there were no damages. The court in *Northwest, supra,* stated at 261:

> "It is clear that no damages were recoverable by appellant for the breach—if breach there were—of the contract. Conceding the rule to be that, in order to recover a sum as liquidated damages, it is unnecessary to prove actual damages, it is also true that no provision in a contract for the payment of a fixed sum as damages, whether stipulated for as a penalty or as liquidated damages, will be enforced *in a case where the court can see that no damages have been sustained. It is the general rule that, where the sum named in the contract to be paid on a breach thereof is evidently wholly disproportionate to the damages actually sustained, or where it is shown that no actual damage has been sustained by the breach, the courts will deem the parties to have intended to stipulate for a mere penalty to secure performance.*" (Italics added).

The Ninth Circuit noted that if bankruptcy had not intervened and Northwest had carried out the contract, its assets would have been no more than sufficient to pay its debts, and it would have had nothing left to turn over. Thus, failure to perform caused no loss, and liquidated damages were not recoverable. *Northwest, supra,* was followed in *The Columbia,* (D.C. Ala. 1912) 197 Fed. 661, *aff'd sub nom. Rasmussen* v. *Home Industry Iron Works,* (5 Cir. 1912) 199 Fed. 990. The Eastern District Court of New York in *Sommers* v. *Timely Toys, Inc.,* (E.D. N.Y. 1953) 110 F. Supp. 844, *appeal denied* (2 Cir. 1954) 209 F.2d 342, reached the same result.

In *Massman* there were no damages; in *Rispin* no damages were sustained; in *Northwest Fixture* the court could

see that no damages had been sustained. In the case at bar, there is no doubt whatever, it is expressly stipulated (R. 4) the government "suffered no actual damage on any project". Therefore, we respectfully submit this matter should be reviewed because of the obvious and admitted conflict between the opinion below and the holdings of the Fifth and Ninth Circuit Courts of Appeal.

2.

This is an important matter of federal law in that the judgment and opinion mark a significant and unwarranted departure from the heretofore recognized doctrine of compensatory damage in federal contracts. The judgment and opinion below conflict with the undergirding principles expressed by this Court in *Priebe & Sons* v. *United States*, 332 U.S. 407. Priebe contracted to sell dried eggs to the government for shipment under Lend-Lease with a liquidated damages provision for failure to have inspection and weight certificates ready on May 18. Priebe did not have the certificates on that date but had them before the government requested delivery on May 26. The government withheld liquidated damages for failure to be ready May 18. Priebe's suit in the court of claims was dismissed. The Supreme Court granted certiorari and the majority, in an opinion written by Mr. Justice Douglas, reversed. The Court noted the only thing that could injure the government was failure of delivery when requested. The Court said the amount stipulated could not possibly be a reasonable forecast of *"just compensation"* for damage caused, because no damage could be caused. The Court thus stated the undergirding principle—"just compensation".

> The Court stated further at 413:
> "All provisions for damages are, of course, deterrents of default. But an exaction of punishment for breach which could produce no possible damage has long been deemed oppressive and unjust."

Mr. Justice Black's dissent in *Priebe* (with whom Mr. Justice Murphy concurred) (414-415) relied on an absence of congressional policy that liquidated damages be "fair and reasonable" and cited 32 Stat. 310, 326, c.1031, 40 U.S.C.A. §269, 9A FCA Title 40, §269. This statute was thereafter repealed October 31, 1951, c.654, §1(91) 65 Stat. 705. At the time the contracts at bar were executed, 41 U.S.C.A. §256(a) was in effect, and provided:

> "Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be *just and equitable.*" (Italics added) Sept. 5, 1950, c. 849, §10(a), 64 Stat. 591.

This indicates a congressional policy that "damages" be "just and equitable".

Mr. Justice Frankfurter's dissent in *Priebe* (with whom Chief Justice Vinson concurred) was rested upon the fact that the Priebe contract was a wartime contract. It would appear that the majority opinion and all dissents in *Priebe* could agree (now that Congress has adopted a policy that damages shall be "just and equitable") at least, as to peacetime contracts.

Obviously troubled by *Priebe,* the opinion below (341 F.2d 1002) seized on the language of Mr. Justice Douglas that if damages are "less than the damages contracted for" it is not fatal. 332 U.S. 412. From this *"less"* the court below extended the rule to our case where damages are "non-existent" and thereby exacted punishment for a breach which caused no damage. *Priebe* reveals a concern for "just compensation". The opinion below favors

"just compensation" in forecast but unjust compensation in fact. It is one thing to liquidate damages where some exist; petitioner submits it is unjust and oppressive to exact one penny's tribute where there are no damages.

One current of thought runs through the cases—a recognition that damages should be compensatory. This doctrine explains *Priebe, supra.* It explains the reason this Court in *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 153, pointed out the "obvious" injury to the government. It explains the requirement in *Priebe* (p. 413), that the provision be a "fair estimate of damages". Why is it important that the forecast be a "fair estimate"? Surely it is because this Court recognizes that damages should be compensatory and not punitive. If the parties had contracted that $100 per day shall be withheld even though it is clear actual damages are not sustained, a court would not hesitate to strike the clause down as a penalty. Can it be fairly assumed that the parties intended this result? We respectfully submit the parties never departed from the principle of compensatory damages. There is nothing to indicate they ever intended to do so. Even if the parties did intend to allow damages where there are none, the underlying principle of *Priebe* would apply and the clause would be stricken down as "oppressive and unjust." Why "oppressive"? Why "unjust"? The oppression and injustice lie in the departure from the principle of compensatory damages.

It is one thing for the parties to agree to a liquidated amount and for the court to award that amount where (1) there are damages (or where they are not clearly nonexistent) and (2) where, at the time of contracting, damages appear difficult to measure. It is quite another to abandon compensatory damages and award relief where there has been no injury.

The *holdings* of the other cases cited in the opinion below do not support the opinion. In *United States* v. *J. D. Streett & Co.*, E.D. Mo., 151 F. Supp. 469, aff'd upon appeal 8 Cir., 256 F.2d 557, it was not established that there were no damages. In *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105, there was damage, though slight. In *Sun Printing & Publishing Assn.* v. *Moore*, 183 U.S. 642, 660, there was substantial damage, 377. In *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151, the Court pointed to "obvious" damage. In *United States* v. *LeRoy Dyal Co.*, 3 Cir., 186 F.2d 460, there is language which supports the opinion below. The court at 463 pointed to the important "public purpose" which was defeated by the breach. This was damage. In *Frick Co.* v. *Rubel Corp.*, 2 Cir., 62 F.2d 765, 768, the damage was small, but there.

The opinion below states the proposition that "proof of actual damage is not required to sustain an action for liquidated damages". (*Infra* p. A10). This rule is not decisive where the fact of no damage is plain or stipulated. The opinion in citing 25 C.J.S., *Damages*, §115 d, neglected the last half of the blackletter rule which reads:

> ". . . but there is authority which holds that where it *appears that no damage was sustained* recovery of the stipulated amount will not be allowed." (Italics added.)

The citation from 15 *Am. Jur., Damages*, §263, neglected the fact that the whole section is limited to those cases which are "regarded by the courts as liquidated damage and not as penalties". The editors in 34 A.L.R. 1336 limited that annotation in precisely the same way. Both citations beg and do not answer the question at bar.

On the other hand, the question is clearly answered in 5 *Corbin on Contracts*, §1063, in these words:

> "But the defendant should be allowed to show that there has in fact been no injury at all. . . ."

Although the opinion below accurately sets out the language of subsection (1) (a) and (b) of the *Restatement, Contracts*, §399 (*Infra* A6-A7) that opinion ignores the repeated A.L.I. requirement of *"harm that is caused."* The opinion distorts the principle of "just compensation" adopted by the A.L.I. in Comment c. and the judgment and opinion are in direct conflict with Comment e. which states:

> "e. If the parties honestly but mistakenly suppose that a breach will cause harm that will be incapable or very difficult of accurate estimation, *when in fact the breach causes no harm at all* or none that is incapable of accurate estimation without difficulty, *their advance agreement* fixing the amount to be paid as damages for the breach is within the rule stated in Subsection (1) and *is not enforceable.* Evidence to prove such a mistake is admissible." (Italics added).

CONCLUSION

It is important that private government contracts be uniformly construed. It is important that justice be the same in all federal courts. It is important that all rulings be consistent with the principles laid down by this Court. It is important that the rule be consistent with the accepted doctrine of the past. This is the only case where the government has stipulated it was not damaged. This fact does not detract from the importance of the question to be decided; this fact isolates the problem and makes the arbitrary character of the exaction painfully clear.

For the reasons stated it is important that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion

[341 F.2d 998]

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,795.

Southwest Engineering Company, a Missouri Corporation, Appellant,

v.

United States of America, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[March 1, 1965.]

Before VAN OOSTERHOUT, BLACKMUN and MEHAFFY, Circuit Judges.

[341 F.2d 999]

VAN OOSTERHOUT, Circuit Judge.

Plaintiff Southwest Engineering Company, hereinafter called Southwest, has appealed from summary judgment dismissing its complaint against the United States for recovery of $8,300 withheld as liquidated damages for delay in performance on four construction contracts entered into between Southwest and the United States.

This appeal is before us upon an agreed statement of the record. Four contracts entered into between South-

west and the Government called for the construction by Southwest of three V. O. R. radio facilities at Readsville, Blackwater, and Maryland Heights, Missouri, and for a high intensity approach light lane at Lambert Field, Missouri. Each of the contracts fixed a completion date and provided for liquidated damages on a per diem basis for each day's delay beyond the agreed completion date. The agreed liquidated damage on the Lambert Field project was $100 per day, and $50 per day on each of the other projects. Each contract contained the general provisions set forth in Standard Form 23-A (March 1953) prescribed by the General Services Administration, including, among others, a provision that plaintiff was not to be charged with delays "due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes." Within ten days from the beginning of any such delay, plaintiff was to notify the contracting officer in writing of the causes of delay. The contracting officer was to ascertain the facts and extent of the delay, and extend the time for completing the work when "in his judgment the findings of fact justify such an extension." His findings of fact were to be final, subject only to appeal to the "head of the department."

The Blackwater project was completed 97 days late. Plaintiff requested time extensions, alleging the delay resulted from causes for which it was not responsible, including acts and omissions of defendant. Administrative

appeals resulted in extensions by the C.A.A. because of delays by the Government, and, later on, a remission of an additional $4,200 liquidated damages by the Comptroller General under the authority of 41 U.S.C. § 256a, because of late delivery of Government-furnished material. This left $550 (11 days) withheld as liquidated damages on the Blackwater project.

The Readsville project was completed 84 days late. Administrative appeals resulted in a three-days extension, leaving liquidated damages for 81 days totalling $4,050.

The Maryland Heights project was completed 48 days late. On administra-

[341 F.2d 1000]

tive appeal, a fourteen-days extension was allowed resulting in liquidated damages of $1,700 for 34 days delay.

The Lambert Field project was completed 54 days late, 34 days extension was granted, leaving $2,000 as liquidated damages for 20 days delay.

The parties stipulated "although each project was not completed until after the date prescribed in its contract, defendant suffered no actual damage on any project." The Government withheld the liquidated damages for delays provided in the contracts after giving credit for the extensions of time administratively allowed. This suit by Southwest is for recovery of the $8,300 so withheld as liquidated damages. The Government counterclaimed for the liquidated damages here involved. Plaintiff by reply admitted the projects were not completed within the time limits as administratively extended but denied the Government was entitled to liquidated damages because the Government caused and contributed to the delays and because the Government suffered no actual damages.

The trial court determined that the Government was entitled to liquidated damages in the amount claimed, offset such damages which equaled the amount of payments withheld, sustained the motion for summary judgment, and dismissed the complaint.

Southwest as a basis for reversal urges the trial court's decision was induced by two erroneous views of the law, either of which requires reversal. The points relied upon for reversal are thus stated:

1. "The court erred in awarding the Government liquidated damages because the government, in order to enforce a contract provision for liquidated damages for delay, must not cause or contribute to such delay, and if the Government does cause or contribute to such delay, it cannot assess liquidated damages."

2. "The court erred in awarding the Government liquidated damages because a contract provision for liquidated damages is clearly a penalty and not enforceable where the party seeking to enforce it formally admits he sustained no actual damage."

At the outset, we observe that the contracts here involved were entered into pursuant to federal law by an authorized federal agency. Federal law controls in the construction and determination of rights under federal contracts. *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 411; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Le Roy Dyal Co.*, 3 Cir., 186 F.2d 460, 461.

In the *Priebe* case, the Supreme Court states:

> "It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law. *United States* v. *Standard Rice Co.*, 323

> U.S. 106, 111, and cases cited. That has been done in other cases where the Court has considered the enforceability of 'liquidated damages' provisions in government contracts." 332 U.S. 407, 411.

Southwest's first point, to the effect that the Government is not entitled to liquidated damages because it caused or contributed to the delay, is without merit. It is true that in the administrative appeals a finding was made that some of the delay was caused by the Government and that some other delays were excusable. No damages were withheld for excusable delays as administratively determined. In rejecting a similar contention, the Supreme Court in *Robinson* v. *United States*, 261 U.S. 486, 488, states:

> "The fact that the Government's action caused some of the delay, presents no legal ground for denying it compensation for loss suffered wholly through the fault of the contractor. Since the contractor agreed to pay at a specified rate for each day's
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> [341 F.2d 1001]
>
> delay not caused by the Government, it was clearly the intention that it should pay for some days' delay at that rate, even if it were relieved from paying for other days, because of the Government's action. . . ."

See *Wells and Wells, Inc.* v. *United States*, 8 Cir., 269 F. 2d 412, 415; *Union Paving Co.* v. *United States*, Ct. Cl., 115 F.Supp. 179.

United States v. *United Eng'r & Contracting Co.*, 234 U.S. 236, relied upon heavily by Southwest, is clearly distinguishable as pointed out by the Supreme Court in *Robinson*, where it said:

> "The case is wholly unlike *United States* v. *United Engineering Co.*, 234 U.S. 236, upon which claimant relies. The question there was one of construction. The lower court found as a fact that, but for the Government's action, the work would have been completed within the contract period; and this Court construed the provision for liquidated damages as not applicable to such case. Here the question is not properly one of construction." 261 U.S. 486, 489.

The trial court found upon review of the administrative record that the findings there made with respect to excusable delays were supported by substantial evidence and were entitled to be upheld upon the basis of the teaching of *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709. We agree.

Southwest's second point in substance is that the parties' stipulation that the Government suffered no actual damage bars any recovery of liquidated damages. Such stipulation was made. It relates to the situation as it existed at the time of the completion of the work. The stipulation does not go to the extent of agreeing that the parties at the time of contracting did not reasonably contemplate that damages would flow from a delay in performance.

The contracts prescribe the payments to be made for delays as liquidated damages. Southwest urges that such provision is a penalty provision. The agreed record is highly condensed and does not show the contract price for the various projects, but such projects appear to be substantial. There is no showing that the liquidated damages for delay provided for are beyond damages reasonably contemplated by the parties at the time of the contract.

Two requirements must be considered to determine whether the provision included in the contract fixing the

amount of damages payable on breach will be interpreted as an enforceable liquidated damage clause rather than an unforceable penalty clause: First, the amount so fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach, and second, the harm that is caused by the breach must be one that is incapable or very difficult of accurate estimation. See *J. D. Streett & Co.* v. *United States,* 8 Cir., 256 F.2d 557, 559; *United States* v. *Le Roy Dyal Co.,* supra; Restatement, Contracts § 339.

Whether these requirements have been complied with must be viewed as of the time the contract was executed rather than when the contract was breached or at some other subsequent time. Courts presently look with candor upon provisions that are deliberately entered into between parties and therefore do not look with disfavor upon liquidated damage stipulations. *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 151; *Priebe & Sons, Inc.* v. *United States,* supra; *United States* v. *Bethlehem Steel Co.,* 205 U.S. 105, 119; *Sun Printing & Publishing Ass'n* v. *Moore,* 183 U.S. 642, 660.

In the *Bethlehem Steel* case, the Court sets out the standard to be applied for determining whether a liquidated damage provision can be upheld as follows: "The question always is, what did the parties intend by the language used? When such intention is ascertained it is

[341 F.2d 1002]

ordinarily the duty of the court to carry it out." 205 U.S. 105, 119.

Here Southwest has failed to establish that the intention of the parties was to do anything other than execute a valid liquidated damage provision.

Priebe & Sons, Inc. v. United States, supra, involved a Government contract for purchase of dried eggs for foreign shipment. The Court observes the contract contains two provisions for liquidated damages. The one involved in the case related to failure to have eggs inspected and ready for delivery for the date specified in the order. The court construed the contract to mean that performance was not due until demand for delivery and held that since inspection was made before such demand, the provision for liquidated damages could not possibly be a reasonable forecast of just compensation for breach of contract. The Court further observes that the contract contains a provision for liquidated damages for delay in delivery upon demand and with respect to such provision, breach of which was not involved, states: "It likewise is apparent that the only thing which could possibly injure the government would be failure to get prompt performance when delivery was due. We have no doubt of the validity of the provision for 'liquidated damages' when applied under those circumstances." 332 U.S. 407, 412.

The Court also speaks of standards applicable to allowance of liquidated damages, stating:

> "Today the law does not look with disfavor upon 'liquidated damages' provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. . . . They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. . . . And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract." 332 U.S. 407, 411-12.

In *Rex Trailer Co.* v. *United States,* supra, recovery was allowed upon the statutory penalty imposed for fraud in obtaining a Government contract. The Court states: "Liquidated-damage provisions, when reasonable, are not to be regarded as penalties, . . ." 350 U.S. 148, 151. And then says:

> "The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss. As this Court recognized in *Priebe & Sons* v. *United States,* 332 U.S. 407, 411-412, liquidated damages 'serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. . . .' And the fact that no damages are shown is not fatal." 350 U.S. 148, 153.

In *United States* v. *J. D. Streett & Co.,* E.D. Mo., 151 F.Supp. 469, 472, Judge Harper, in upholding a claim for liquidated damages, states:

> "Although it is clear that a finding that a provision is one for liquidated damages requires that damages could be anticipated at the time of execution of the contract, whether actual damage did or did not occur or was not proved to have occurred does not prevent recovery."

We affirmed upon appeal. *J. D. Streett & Co.* v. *United States,* 8 Cir., 256 F.2d 557.

The late Judge Goodrich in *United States* v. *Le Roy Dyal Co.,* supra, in a well-considered opinion dealing with numerous aspects of the liquidated damage issue, states:

> "If a provision for liquidated damages is upheld the fact that actual damage did or did not occur or was

not proved to have occurred does not prevent the recovery of the stipulated sum. There is some dissent on this point, but the statement just made represents the great weight of decided cases." 186 F.2d 460, 462.

In *Frick Co.* v. *Rubel Corp.*, 2 Cir., 62 F.2d 765, 768, the late Judge Learned Hand allowed liquidated damages, stating inter alia:

> "My brothers think, though I do not, that evidence as to the *actual* loss was not material to the issue of the losses in *contemplation*, though we all agree that it is the comparison of the liquidated damages with the last, not the first, which can raise the point at all."

25 C.J.S. Damages § 115 d, 15 Am. Jur., Damages, § 263, and 34 A.L.R. 1336, 1341, and supporting cases cited in such authorities, indicate that the majority view is that proof of actual damages is not required to sustain an action for liquidated damages, unless the contracts so provide, at least in situations where damages could reasonably be anticipated at the time of contracting.

We recognize that there are cases, including *Massman Const. Co.* v. *City Council of Greenville*, 9 Cir., 147 F.2d 925, *Rispin* v. *Midnight Oil Co.*, 9 Cir., 291 Fed. 481, and *Northwest Fixture Co.* v. *Kilbourne & Clark Co.*, 9 Cir., 128 Fed. 256, cited by Southwest, which reach a contrary result.

We believe that the cases holding that the situation existing at the time of the contract is controlling in determining the reasonableness of liquidated damages are based upon sound reasoning and represent the weight of authority. Where parties have by their contract agreed upon a liquidated damage provision as a reasonable forecast of

just compensation for breach of contract and damages are difficult to estimate accurately, such provision should be enforced. If in the course of subsequent developments, damages prove to be greater than those stipulated, the party entitled to damages is bound by the liquidated damage agreement. It is not unfair to hold the contractor performing the work to such agreement if by reason of later developments damages prove to be less or nonexistent. Each party by entering into such contractual provision took a calculated risk and is bound by reasonable contractual provisions pertaining to liquidated damages.

Southwest has completely failed to demonstrate that the court committed an error of law in determining that absence of actual damages at the time of breach of the contract or thereafter does not bar recovery of liquidated damages. The court at least impliedly found that the liquidated damage provisions of the contracts here involved were reasonable when viewed in the light of circumstances existing at the time the contract was entered into. We find nothing in the record which would compel a contrary conclusion. The court committed no error in allowing liquidated damages.

The judgment appealed from is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 177

SOUTHWEST ENGINEERING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Western District of Missouri (R. 7–13)[1] is not reported. The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A–1–A–11) is reported at 341 F. 2d 998.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1965. The petition for a writ of certiorari was filed on May 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the printed record in the Court of Appeals, copies of which have been filed in this Court.

778-178—65

QUESTION PRESENTED

Whether a provision in a government construction contract specifying the amount of liquidated damages to be paid for each day's delay in completion not caused by the government is enforceable in the absence of a showing of actual damage.

STATEMENT

Petitioner brought this action against the United States under 28 U.S.C. 1346(a) to recover $8,300 withheld by the government as liquidated damages because of the petitioner's delay in completing four construction projects. The government admitted the full performance of the projects but counterclaimed for liquidated damages because the projects were not completed within the prescribed time. In reply, petitioner admitted the projects were not timely completed but denied that the government was entitled to liquidated damages because, *inter alia*, the government suffered no actual damages (Pet. App. A–3). Both courts below rejected petitioner's contention and held that the government, pursuant to its contract, had properly assessed liquidated damages (Pet. App. A–11, R. 12).

The relevant facts are undisputed and were summarized by the court of appeals (Pet. App. A–1–3). In 1957, petitioner and the United States entered into three contracts under which petitioner was to construct for the Civil Aeronautics Administration three V.O.R. radio facilities at Readsville, Blackwater, and Maryland Heights, Missouri, and a high intensity approach light lane at Lambert Field, Missouri. Each

contract fixed a completion date and provided for liquidated damages on a per diem basis for each day's delay beyond the contracted completion date. The agreed liquidated damages were $50 per day on the three V.O.R. radio facilities and $100 per day on the Lambert Field project. Each contract contained the general provision that petitioner was not to be charged with delays due to specified causes beyond its control, including acts of the government. Within ten days from the beginning of any such delay, petitioner was to notify the contracting officer in writing of the cause of the delay. The contracting officer was to ascertain the facts and extent of the delay and extend the time for completing the work when, in his judgment, such an extension was justified. His findings were to be final, subject only to appeal to the head of the department.

The Blackwater project was completed 97 days late. Administrative appeals resulted in extensions by the Civil Aeronautics Administration because of government delay, and, later on, in a remission of $4,200 liquidated damages by the Comptroller General because of late delivery of government-furnished materials. This left $550 (11 days) withheld as liquidated damages. The Readsville project was completed 84 days late. Administrative appeals resulted in a three day extension by the C.A.A., leaving $4,050 (81 days) withheld as liquidated damages. The Maryland Heights project was completed 48 days late. On administrative appeal, the C.A.A. granted a fourteen day extension, leaving $1,700 (34 days) withheld as liquidated damages. The Lambert Field project was

completed 54 days late. On administrative appeal, the C.A.A. granted 34 days extension, leaving $2,000 (20 days) withheld as liquidated damages.

The parties stipulated that, although "each project was not completed until after the date prescribed in its contract, [the government] suffered no actual damage on any project." The government nonetheless withheld the liquidated damages for delay provided in the contracts after relieving the petitioner from paying damages for excusable delays as administratively determined.

This suit followed. On a motion for summary judgment, the district court rejected petitioner's contention that actual damages are necessary and upheld the government's claim to liquidated damage (R. 9, 12). The court of appeals affirmed. It held the test to be whether "the liquidated damage provisions of the contracts here involved were reasonable when viewed in the light of circumstances existing at the time the contract was entered into" and not "when the contract was breached or at some other subsequent time." (Pet. App. A–11, A–7.)

ARGUMENT

The decision below is correct. It is in accord with the decisions of this Court upholding the validity and enforceability of "liquidated damages" provisions in government contracts when they are fair and reasonable attempts to fix just compensation for the anticipated delay which might result from a breach of contract. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151, 153; *Priebe and Sons* v. *United States*, 332 U.S. 407,

411; *Robinson* v. *United States,* 261 U.S. 486; *Wise* v. *United States,* 249 U.S. 361, 365; *United States* v. *Bethlehem Steel Co.,* 205 U.S. 105, 121. There is no conflict of decisions among the courts of appeals with respect to the interpretation of the liquidated damages provisions of government contracts. Further review by this Court is, therefore, not warranted.

1. Petitioner's chief contention is that the liquidated damages provision of a government contract may be enforced only in those cases in which the government has suffered actual damages. Its premise is that otherwise the provision would exact a penalty. A similar contention was expressly rejected by this Court in *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 153, where the Court pointed out that "the fact that no damages are shown is not fatal" to a claim for liquidated damages. And see *United States* v. *Bethlehem Steel Co.,* 205 U.S. 105, 120–121, where a "finding that no damages in fact flowed from the failure to deliver on time" was held not to "affect the meaning of this clause as used in the contract nor render its language substantially worthless for any purpose of security for the proper performance of the contract as to time of delivery."

The contract is viewed as of the time when the parties entered into it. *Priebe and Sons* v. *United States,* 332 U.S. 407, 412; *United States* v. *Bethlehem Steel Co.,* 205 U.S. 105, 119; *Wise* v. *United States,* 249 U.S. 361, 365-367, see also *Frick Co.* v. *Rubel Corp.,* 62 F. 2d 765 (C.A. 2). That it turns out that there is no actual damage is immaterial. *Rex Trailer Co.* v. *United States, United States* v. *Bethlehem*

Steel Co., supra, United States v. *Le Roy Dyal Co.*, 186 F. 2d 460, 462 (C.A. 3), certiorari denied, 341 U.S. 926. Accordingly, in determining whether a provision for liquidated damages is in fact a penalty, it is necessary to seek the intention of the parties in the light of the circumstances existing at the time they entered into the contract. *United States* v. *Bethlehem Steel Co., supra,* 205 U.S. at 119, *Sun Printing and Publishing Ass'n* v. *Moore,* 183 U.S. 642, 669, *Frick Co.* v. *Rubel Corp.,* 62 F. 2d 765, 768 (C.A. 2). And when "such intention is ascertained it is ordinarily the duty of the court to carry it out." *United States* v. *Bethlehem Steel Co., supra,* 205 U.S. at 119.

Applying these principles to the instant case, the court of appeals found "no showing that the liquidated damages for delay provided for are beyond damages reasonably contemplated by the parties at the time of the contract." (Pet. App. A–6.) Even petitioners do not suggest that the liquidated damage figure of $50 per day in the construction of the three V.O.R. radio facilities and $100 per day for the high intensity approach lane at Lambert Field was an unreasonable advance estimation of the extent of the damage that the government might suffer in the event of delay.[2]

[2] Although, as pointed out by the court of appeals, the agreed record is highly condensed and does not show the substituted contract price of the various projects (Pet. App. A–6), the

2. The decision below is not in necessary conflict with decisions by the Fifth and Ninth Circuits. Both courts recognized the principles stated above and sought to ascertain "the intention of the parties." *Massman Construction Co.* v. *City Council of Greenville, Miss.*, 147 F. 2d 925, 927 (C.A. 5), *Rispin* v. *Midnight Oil Co.*, 291 Fed. 481, 484 (C.A. 9). Although the contract used the nomenclature "liquidated damages" in *Massman Construction Co.*, the court thought it clear the parties intended only to stipulate the *amount* of the actual damages, should they in fact ensue from delay. 147 F. 2d at 927. Here, on the contrary, the court concluded that the contracting parties meant to settle (in accordance with reasonable expectations) both the *existence* and the amount of damages in the event of delay in completion. Although holding that a liquidated damages clause would not be enforced without actual damages in *Rispin*, the Ninth Circuit expressly stated that it did not there determine whether the claim was for liquidated damages or a penalty and recognized that in some circumstances such a clause might be valid depending upon the entire agreement, "the nature of the subject-matter involved and the purpose for which the agreement was made." 291 Fed. at 484.

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estimated costs of construction for the various projects was as follows:

"V.O.R. radio facilities at Readsville and Blackwater, $37,500 (contract No. C 3ca–1038–A).

"V.O.R. radio facilities at Maryland Heights, $23,815 (contract No. C 3ca–1039–A).

"High Intensity Approach Lane at Lambert Field, $53,058 (contract No. C 3ca–1182–A)."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Repectfully submitted.

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